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LORNA L. NOTSCH, Tenant/Petitioner, v. CARMEL PARTNERS, Housing Provider/Respondent.	Case No.: RH-TP-06-28690 *In re* 1833 Summit Place, N.W. Unit No. 101

ORDER ON TENANT'S MOTION FOR ATTORNEY'S FEES

I. Introduction

On March 24, 2008, this administrative court served a Final Order in this case awarding Tenant $2,357.17 in rent refunds and interest, and directing a roll back of Tenant's rent by $117 to $1,039 per month. On April 7, 2008, Tenant filed a Motion for Award of Attorney's Fees, seeking an award of $12,441.18. By Order of April 11, 2008, I denied the motion because it lacked supporting documentation, but I allowed Tenant's counsel to resubmit the motion with appropriate documentation.

On April 21, 2008, Tenant filed a Renewed Motion for Attorney's Fees. The motion was supported by four exhibits: (1) an invoice dated April 20, 2007, from Phyllis J. Outlaw & Associates showing that Tenant had been billed $11,929.93 for legal fees in the case, of which $5,600 had been paid (Tenant's Ex. 1); (2) a computer printout itemizing legal services totaling 57.25 hours that Ms. Outlaw's associate, Kimberly Fahrenholz, Esq., performed on the case

(Tenant's Ex. 4); (3) an affidavit from Ms. Fahrenholz itemizing an additional 2.75 hours of legal services since March, 2007 (Tenant's Ex. 2); and (4) a retainer agreement dated December 21, 2006, between Tenant and The Law Office of Phyllis J. Outlaw & Associates (Tenant's Ex. 3).

Housing Provider opposes Tenant's motion on three grounds: (1) Housing Provider reports that Tenant's original attorney of record, Phyllis J. Outlaw, was suspended from the practice of law for sixty days, effective March 31, 2007.[1] Housing Provider contends that, as a consequence, the suspended attorney "may not collect any fees, even for work performed before the . . . suspension." Housing Provider's Opp'n at 3. (2) Housing Provider notes that the $12,411.18 fees that Tenant seeks exceeds the $10,500 amount that is documented in Tenant's statements of the hours worked. Housing Provider's Opp'n at 4. (3) Housing Provider claims that Tenant's counsel fees are excessive because Tenant sought over $10,000 in relief in the tenant petition but received an award of only $2,357.17. Housing Provider's Opp'n at 4.

In a belated reply memorandum Tenant notes that the fees for which she seeks reimbursement arose before Ms. Outlaw were suspended, or were incurred by Tenant's present attorney, Ms. Fahrenholz, after the suspension.[2] Tenant's motion is now ripe for decision. For reasons discussed below, I award Tenant attorney's fees of $7,875.00.

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[1] The Court of Appeals' order of suspension was issued March 1, 2007. *In Re Outlaw*, 917 A.2d 684 (D.C. 2007). Under D.C. Bar Rule XI § 14(g) the suspension was effective 30 days after it was issued.

[2] I am granting Tenant's motion to file a late reply. Ms. Fahrenholz was an associate in Ms. Outlaw's firm until Ms. Outlaw's was suspended in March 2007. Ms. Fahrenholz then established a separate practice at a new address. On April 4, 2007, Ms. Outlaw filed a praecipe withdrawing her appearance in this case and entering Ms. Fahrenholz's appearance. On April 25, 2007, Ms. Fahrenholz filed a notice of change of address with this administrative court.

II. The Effect of Counsel's Suspension on Tenant's Claim for Attorney's Fees

Because Housing Provider asserts that the 60-day suspension of Tenant's counsel invalidates Tenant's entire claim for attorney's fees, I will first resolve this issue of entitlement. The starting point is the governing statute and regulations. The Rental Housing Act provides that: "The Rent Administrator [Administrative Law Judge], Rental Housing Commission, or a court of competent jurisdiction may award reasonable attorney's fees to the prevailing party in any action under this chapter, except actions for eviction authorized under § 42-3505.01." D.C. Official Code § 42-3509.02. The Rental Housing Regulations, in turn, provide that a "presumption of entitlement to an award of attorney's fees is created by a prevailing tenant, who is represented by an attorney." 14 District of Columbia Municipal Regulations (DCMR) 3825.2.

Both the statute and the regulations indicate that the award of attorney's fees is payable to the "prevailing party" or the "tenant," rather than to the attorney directly. The record here shows that Tenant paid Phyllis J. Outlaw & Associates $5,600 in fees as of May 21, 2007, with a balance of $6,531 outstanding. Tenant's Renewed Mot. for Attorney's Fees, Ex. 1. If I were to deny Tenant's motion because her counsel was suspended, it would penalize the client for attorney conduct that had nothing to do with this case.

Nor is there any indication that the attorney's fees that Tenant seeks were not properly earned. The rationale of the authorities that Housing Provider proffers to justify denying the motion for attorney's fees on account of counsel's suspension does not apply to fees, such as those here, that are retained and billed on an hourly basis. Housing Provider's principal authority, *Fletcher v. Krise*, 120 F.2d 809, 811 (D.C. 1941), denied a contingent fee to an attorney because "he has not performed his engagement and the contingency on which the

compensation was to rest has not happened." Here Tenant agreed to pay Ms. Outlaw's firm for legal services performed irrespective of the results obtained. *See* Tenant's Ex. 3. Moreover, counsel was successful in obtaining a recovery and it is not Tenant, the party who retained counsel, but Housing Provider who is raising objection to the fees. Here, it is questionable whether Housing Provider even has standing to assert the unauthorized practice of law as a justification to deny an award of attorney's fees. *See Landise v. Mauro*, 725 A.2d 445, 451 (D.C. 1998) (holding that a law partner could not refuse to share contingent fee proceeds with a partner who was not authorized to practice in the District of Columbia); *Burleson v. United Title Escrow Co.*, 484 A.2d 535, 537 (D.C. 1983) (holding that a defendant who was not injured had no standing to maintain an action for the unauthorized practice of law because "[b]asic to standing is the requirement that the individual be injured in fact by the conduct of the other party"). Housing Provider's injury here arises not because of any unauthorized practice of law by Tenant's counsel, but from the fact that Tenant prevailed on the merits.

Moreover, there is no indication that Tenant seeks fees for any work performed by Ms. Outlaw while she was suspended. The hearing of this case, on March 27, 2007, took place before Ms. Outlaw's suspension took effect. Ms. Outlaw did not appear at the hearing. She submitted her praecipe of withdrawal on April 4, 2007, shortly after her suspension began. After that date Ms. Fahrenholz, who had previously appeared in an associate capacity, succeeded Ms. Outlaw as attorney of record. Ms. Fahrenholz soon moved out of Ms. Outlaw's offices and there is no indication that she acted as a "front" for Ms. Outlaw, as Housing Provider suggests. The circumstances here are markedly different from those in the cases cited by Housing Provider, which involved attorneys who used other attorneys to conceal the active practice of law while they were suspended. *See Kansas v. Schumacher*, 519 P2d 1116, 1128 (Kan. 1974) (suspended

attorney used another attorney as a "front man" to appear in court while "in all other respects he continued to function just as he had before the suspension"); *In re Lacey,* 81 P.2d 935, 938 (Cal. 1938) (suspended attorney used another attorney "as a subterfuge when the interests he represented required court action").

I conclude, therefore, that Tenant is entitled to claim attorney's fees for work performed by Ms. Fahrenholz both during and after her association with Ms. Outlaw, notwithstanding Ms. Outlaw's suspension. Housing Provider's other objections concern Tenant's claim for Ms. Outlaw's undocumented time and the alleged excessiveness of Tenant's fee request in view of the modest amount of Tenant's recovery. I consider these objections as part of my analysis below.

III. The Merits of Tenant's Claim for Attorney's Fees

The applicable Rental Housing Regulations require that an award of attorney's fees "be based on an affidavit executed by the attorney of record itemizing the attorney's time for legal services and providing the applicable information listed in § 3825.8." 14 DCMR 3825.7. The application "must be sufficiently detailed to permit the [administrative court] to make an independent determination whether or not the hours claimed are justified." *Hampton Courts Tenant's Assoc. v. D.C. Rental Hous. Comm'n*, 599 A.2d 1113, 1117 (D.C. 1991) (quoting *Nat'l Assoc. of Concerned Veterans v. Sec'y of Defense*, 675 F.2d 1319, 1327 (D.C. Cir. 1982).

The documentation submitted in support of Tenant's renewed motion conforms to these requirements. The computer printout of Ms. Fahrenholz's time lists specific activities that she performed, the date, and the time expended in increments of as little as five minutes. Ms. Fahrenholz's supplementary affidavit sets forth additional activities totaling 2.75 hours of

time. Although the affidavit does not state the dates on which these services were performed, the amount of time is modest and seems to be appropriate for the work that is described, so I will include this additional time in my award.

Ms. Fahrenholz states in her affidavit that her former colleague, Phyllis J. Outlaw, also spent time on the case. One of Housing Provider's objections to Tenant's motion for attorney's fees is that there is no accounting of the dates, tasks, or times of Ms. Outlaw's work. Without detailed information about the services Ms. Outlaw performed and the time that she spent, I cannot make an independent determination as to whether her fees were reasonable. Therefore, I will not include any of Ms. Outlaw's services in my award.

The regulations establish a two-step process for assessment of attorney's fees. "The starting point shall be the lodestar, which is the number of hours reasonably expended on a task multiplied by a reasonable hourly rate." 14 DCMR 3825.8(a). The lodestar amount then "may be reduced or increased" in consideration of thirteen factors:

(1) the time and labor required;

(2) the novelty, complexity, and difficulty of the legal issues or questions;

(3) the skill requisite to perform the legal service properly;

(4) the preclusion of other employment by the attorney, due to acceptance of the case;

(5) the customary fee or prevailing rate in the community for attorneys with similar experience;

(6) whether the fee is fixed or contingent;

(7) time limitations imposed by the client or the circumstances;

(8) the amount involved and the results obtained;

(9) the experience, reputation, and ability of the attorney;

(10) the undesirability of the case;

(11) the nature and length of the professional relationship with the client;

(12) the award in similar cases; and

(13) the results obtained, when the moving party did not prevail on all the issues.

14 DCMR 3825.8(b). *See Covington v. Foley Props.,* TP 27,985 (RHC June 12, 2007) at 2-3. The 13 factors prescribed in the Rental Housing Regulations are virtually identical to the 12 factors enumerated in *Frazier v. Cent. Motors, Inc.*, 418 A.2d 1018, 1025 (D.C. 1980), with the addition of a thirteenth factor: "The results obtained, when the moving party did not prevail on all the issues."

Under the Rental Housing Act and the Rental Housing Regulations, attorney's fees are only available to a tenant who is a "prevailing party." To be deemed a prevailing party "it is necessary only that the plaintiff succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit." *District of Columbia v. Jerry M*, 580 A.2d 1270, 1274 (D.C. 1990) (quoting *Hensley v. Eckhart*, 461 U.S. 424, 433 (1983) (quoted in *Slaby v. Bumper*, TP 21,518 (RHC Sep. 21, 1995) at 14). Here Tenant received an award of $2,357.17, and a rent roll back of $117 per month. Unquestionably, she is the prevailing party.

The next step in the process is to establish the lodestar — the reasonable hours that Tenant's counsel expended on the litigation and the reasonable hourly rate. Determining the number of "reasonable" hours is problematic in a case such as this one, where Tenant, although the prevailing party, did not prevail on all her claims. Courts have repeatedly held that a prevailing party should not be compensated for time spent on unsuccessful claims. *See Hensley v. Eckerhart*, 461 U.S. at 439. ("[w]here plaintiff failed to prevail on a claim that is distinct in all

respects from his successful claims, the hours spent on the unsuccessful claims should be excluded in considering the amount of a reasonable fee"); *Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4, 13 (D.C. Cir. 1984) (court should exclude hours on unsuccessful claims). An adjustment for time spent on unsuccessful claims similarly mandated in the second phase of the process. Two of the thirteen factors prescribed in 14 DCMR 3825.8(b) are implicated: (8) the amount involved and the results obtained; and (13) the results obtained, when the moving party did not prevail on all the issues. *See Covington v. Foley Prop., Inc.*, TP 27, 985 (RHC Jun. 12, 2007) at 6 (holding that the 13th factor "requires the Commission to avoid compensation for legal work relating to issues which the Commission denied").

Here Tenant arguably prevailed on only two of the six claims asserted in the tenant petition.[3] Housing Provider urges that Tenant's motion for attorney's fees should be denied in its entirety because Tenant did not prevail on all her claims and obtained a recovery that was less than the amount of attorney's fees she requests. However, it would be inappropriate either to deny the fees entirely or to reduce the lodestar hours using a "mathematical approach" based on the number of claims. *See Hensley v. Eckerhart,* 461 U.S. at 440 ("Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fees award reduced simply because the court did not adopt each contention raised. But where plaintiff achieved only limited success, the court should award only the amount that is reasonable

[3] Tenant prevailed on her claims that: (1) the rent increase was larger than the amount of increase allowed under the Rental Housing Act; and (2) Housing Provider failed to file the proper forms with the Rent Administrator. She failed to prove that: (1) 180 days had not passed since a previous rent increase; (2) a proper 30 day notice was not provided before a rent increase became effective; (3) the rent ceiling filed with the Rent Administrator was improper; (4) a rent increase was taken when her unit was not in substantial compliance with the Housing Regulations; and (5) services and facilities in her unit had been permanently eliminated. Although she proved that services and facilities in her unit had been substantially reduced, she received no award on this account because the consequent reduction of the rent ceiling did not bring the ceiling below the rent she was charged.

in relation to the results obtained."). *See also Lively v. Flexible Packaging Ass'n*, 930 A.2d 984, 992 (D.C. 2006) (following *Hensley*).

An alternative approach would be to reduce the hours for which Tenant seeks compensation by eliminating time spent on specific claims. *See Hensley*, 461 U.S. at 437; *Laffey*, 746 F2d at 13. But here that is not practicable. Although Tenant's counsel has submitted a detailed itemization of her tasks and the time expended, Tenant's Ex. 3, the tasks are not linked to specific claims. For example, Tenant's counsel lists a number of entries relating to Tenant's motions for subpoenas. One of the subpoenaed witnesses, Gene Santomartino, gave critical testimony in support of Tenant's prevailing claim concerning illegal rent increases. The two other subpoenaed witnesses, Inspectors Butler and Smoot, gave testimony concerning services and facilities issues on which Tenant did not prevail or did not receive an award. There is no way to separate the time spent on these or other issues, on a claim by claim basis.

Because it is not possible to reduce Tenant's counsel's hours selectively, I will reduce the number of the hours that Tenant's counsel expended by an amount that I consider to be reasonable in light of time that was spent and the results that were obtained. I find that a 25% reduction in Tenant's counsel's lodestar hours is appropriate in view of the following considerations: (1) Tenant prevailed on less than half of the claims that were asserted in the tenant petition. (2) Tenant obtained no recovery on her claim for a substantial reduction in services and facilities, a claim that accounted for a major part of the testimony at the hearing, including testimony from two subpoenaed DCRA inspectors. (3) The award that Tenant received was substantially less than the counsel fees that Tenant's counsel seeks, even allowing for the value of the rent rollback. (4) Tenant failed to prove that Housing Provider acted in bad faith and to obtain an award of treble damages, although the claim of bad faith was a key element

in Tenant's counsel's argument. *See Dey v. L.J. Dev., Inc.*, TP 26,119 (RHC Nov. 17, 2003) (reducing counsel's hours by 25% to discount for issues where Tenant did not prevail where time spent on particular issues was not delineated); *Covington v. Foley Props.*, TP 27,985 (RHC June 12, 2007) at 9 (reducing attorney's fees by 20% where Tenant did not prevail on all claims).

When we apply the 25% reduction to the 60 hours that Tenant's counsel has recorded, the lodestar is reduced to 45 hours. The next step under 14 DCMR 3825.8(a) is to establish a reasonable hourly rate for counsel's service. Tenant's counsel seeks compensation at a rate of $175 per hour for her services.

I find counsel's rate to be reasonable for lodestar purposes. Counsel states that she was admitted to the Maryland Bar in 2005 and the District of Columbia Bar in 2006. The rate she requests is consistent with rates that have been approved by the Rental Housing Commission for fees in rental housing cases. *See, e.g., Carter v. Davis,* TP 23,535 (RHC Dec. 11, 1998) (awarding attorney's fees of $115 per hour in 1998 for attorneys with less than five years of practice). Moreover, it is significantly less than the $205 per hour rate prescribed by the "Laffey Matrix" that is maintained by the United States Attorney's Office for the District of Columbia as a measure of appropriate hourly rates for use in attorney's fees awards.[4]

[4] The Laffey Matrix derives from the hourly rates allowed by the United States District Court for the District of Columbia in *Laffey v. Northwest Airlines, Inc.*, 572 F.Supp. 354 (D.D.C. 1983), *aff'd in relevant part*, 746 F.2d 4 (D.C. Cir. 1984). It provides a schedule of hourly rates prevailing in the Washington, D.C. Metropolitan Area for attorneys at various levels of experience. Use of the Laffey Matrix has been approved by the District of Columbia Court of Appeals for awards in cases where attorney's fees are permitted by statute. *Lively v. Flexible Packaging Ass'n*, 930 A.2d 984, 988-89 (D.C. 2007). The matrix is available on the web site of the United States Attorney's Office for the District of Columbia: http://www.usdoj.gov/usao/dc/Divisions/Civil_Division/Laffey/Matrix_7.html.

The lodestar for purposes of 14 DCMR 3825.8(a) is the reasonable number of hours expended times the reasonable hourly rate, or 45 hours times $175 per hour. The lodestar is $7,875.00. It remains to consider whether the lodestar should be increased or decreased on account of any of the thirteen factors enumerated in 14 DCMR 3825.8(b).

For this second step, we start with the principle that the lodestar fee is "presumptively reasonable." Any increase or decrease under 14 DCMR 3825(b) should be restricted to "exceptional cases." *Hampton Courts Tenants Ass'n v. D.C. Rental Hous. Comm'n*, 599 A.2d 1113, 1115 (D.C. 1991). *See also Hensley*, 461 U.S. at 435. Tenant's counsel has not argued that this case is sufficiently "exceptional" as to justify an enhancement of her fee. Nor do I find that such an enhancement would be appropriate. The time and labor required, the skill and proficiency of counsel, and the complexity of the issues were well within the bounds of ordinary expectations. Counsel has not claimed an enhancement due to special circumstances such as time limitations, preclusion of other work, or undesirability.

For similar reasons, I see no justification for reducing the lodestar fee here. Factors (8) and (13) permit the judge to reduce the award if the results obtained were inadequate or the moving party did not prevail on all the issues. However, these factors have already been considered in my reduction of the lodestar fee, so it would be redundant to consider them again. Factors (5), (9) and (12), involving the prevailing rate for attorneys, the experience of the attorney, and awards in similar cases, have been considered in my analysis of the appropriate hourly rate for the lodestar. In the final analysis, I find that none of the 13 factors prescribed in 14 DCMR 3825.8(b) is sufficiently exceptional to merit an increase or decrease in the lodestar fee. I therefore award Tenant the entire lodestar fee of $7,875.00.

IV. Order

Accordingly, it is this **9th** day of **June, 2008,**

ORDERED, that Tenant's Motion for Attorney's Fees is **GRANTED IN PART** and **DENIED IN PART**; and it is further

ORDERED, that Housing Provider Carmel Partners pay Tenant Lorna Notsch **SEVEN THOUSAND, EIGHT HUNDRED AND SEVENTY-FIVE DOLLARS ($7,875.00)** within 30 days of service of this Order; and it is further

ORDERED, that the appeal rights of any party aggrieved by this Order are set forth below.

____/s/_____
Nicholas H. Cobbs
Administrative Law Judge